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No. 87-63

In the Supreme Court of the United States

OCTOBER TERM, 1987

NORTHEASTERN PHARMACEUTICAL AND CHEMICAL COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

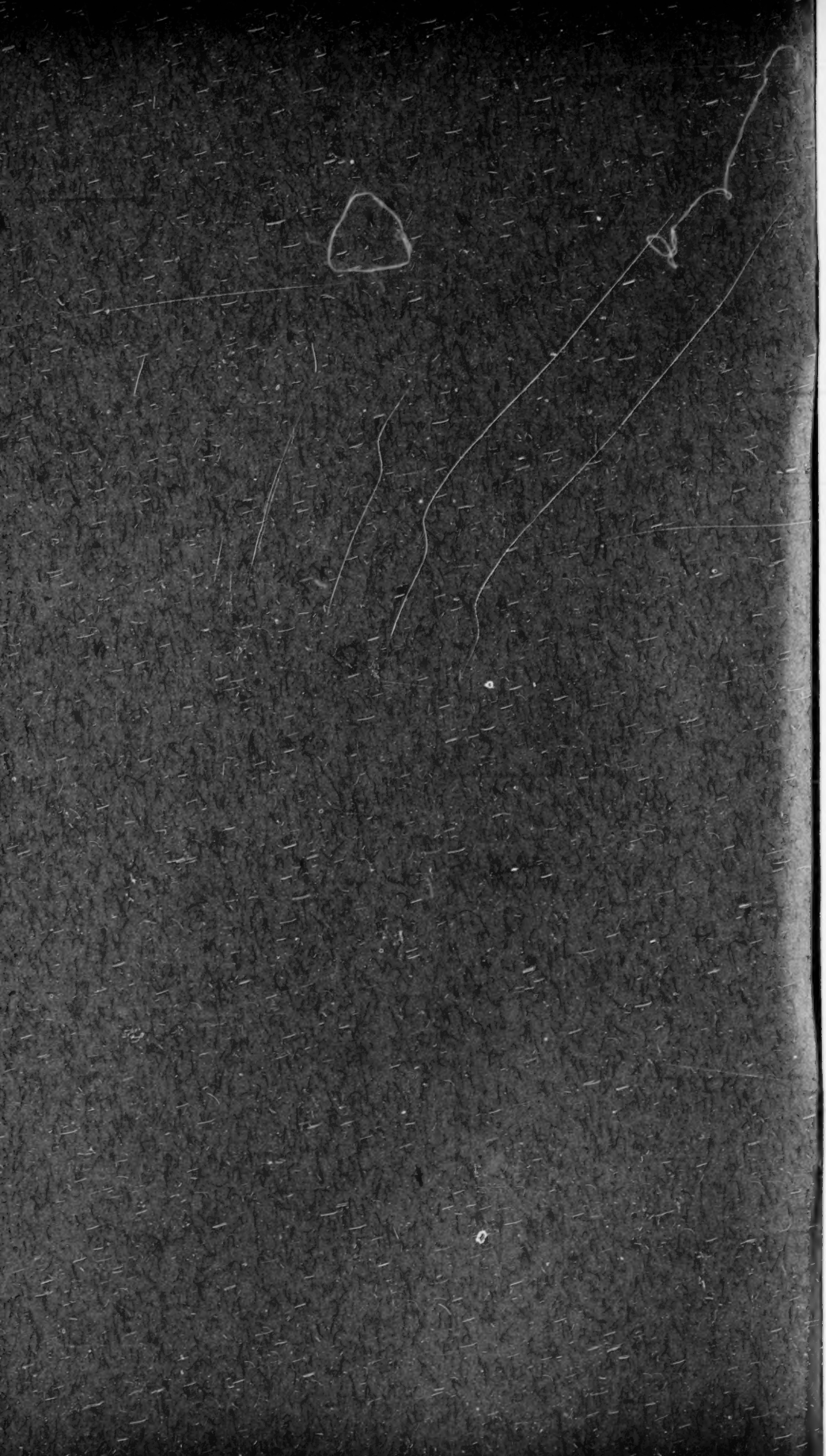
BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. (& Supp. III) 9607, or Section 7003 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. (& Supp. III) 6973, authorizes the government to bring an action against a generator of hazardous waste to recover under a theory of strict liability the costs of cleaning up its hazardous waste when the disposal site where the waste was located was abandoned and rendered inactive prior to the enactment of the federal statute.

2. Whether a cost recovery action under either CERCLA or RCRA against a generator of hazardous waste is an unconstitutional retroactive imposition of liability in violation of due process when liability is based on a theory of strict liability and when the disposal site was abandoned and rendered inactive prior to the enactment of the federal statute.

3. Whether officers of a corporation may be held liable in their individual capacities under CERCLA or RCRA based on their involvement in the corporation's generation and disposal of hazardous wastes.

4. Whether the defendants in a cost recovery action under CERCLA bear the burden of proving that the government's documented costs are unreasonable and are inconsistent with the National Contingency Plan, which, pursuant to Section 105 of CERCLA, 42 U.S.C. 9605, guides the government's response actions under CERCLA.

5. Whether CERCLA authorizes recovery of cleanup costs incurred by the government before CERCLA's enactment.

6. Whether the Seventh Amendment entitled petitioners to a jury trial in this action seeking restitution of the government's cleanup costs.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A47) is reported at 810 F.2d 726. The opinion of the district court (Pet. App. A50-A108) is reported at 579 F. Supp. 823.

JURISDICTION

The judgment of the court of appeals (Pet. App. A48) was entered on December 31, 1986. A petition for rehearing was denied by the court of appeals on

April 8, 1987 (Pet. App. A49). The petition for certiorari was filed on July 7, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This is an action brought by the United States under the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. (& Supp. III) 6901 *et seq.*, and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. (& Supp. III) 9061 *et seq.*, to recover from petitioners costs incurred by the government in cleaning up an abandoned and inactive hazardous waste site and to establish petitioners' liability for any future cleanup costs associated with the site.

In RCRA, Congress directed the Environmental Protection Agency (EPA) to promulgate a comprehensive regulatory program for "cradle-to-grave" management of hazardous wastes. See H.R. Rep. 96-1016, 96th Cong., 2d Sess. Pt. 1, at 17 (1980); 42 U.S.C. 6921-6931. Section 7003(a) of RCRA authorizes EPA to bring suit against "any person * * * contributing to" the handling, storage, treatment, transportation, or disposal of any solid or hazardous waste that "may present an imminent and substantial endangerment to health or the environment" (42 U.S.C. (& Supp. III) 6973(a)).[1] CERCLA is specifically concerned with the cleanup of hazardous waste sites. Under Section 106(a) of CERCLA, the United States may bring suit "to se-

[1] As discussed *infra*, at pages 9-10 & note 8, Congress amended Section 7003 in November 1984 after entry of the district court's judgment in this case, partly in response to that decision.

cure such relief as may be necessary to abate [a] danger or threat" "to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility" (42 U.S.C. 9606(a)). Under Section 104, 42 U.S.C. 9604, the United States may also expend funds from the Hazardous Substance Response Trust Fund (Superfund)—established by Section 221(a) of CERCLA, 42 U.S.C. 9631(a)—to abate an actual or threatened release of a hazardous substance and, pursuant to Section 107 of CERCLA, 42 U.S.C. (& Supp. III) 9607, bring suit against certain "covered persons" to recover those costs.

1. Petitioner Northeastern Pharmaceutical and Chemical Company (NEPACCO) manufactured the disinfectant hexachlorophene at its Verona, Missouri, plant from April 1970 to January 1972 (Pet. App. A3, A53). Petitioner Edwin Michaels formed NEPACCO, and was its president (*id.* at A3, A52). Petitioner John Lee was its vice-president and supervised NEPACCO's manufacturing plant (*ibid.*). Michaels and Lee knew that NEPACCO's manufacturing processes "produced by-products that contained toxic substances, including dioxin, that could be hazardous to human health" and both had personally participated in decisions concerning the management and disposal of that waste (*id.* at A4, A55, A56). In July 1971, petitioner Lee personally approved the dumping of approximately eighty-five 55-gallon drums of waste from NEPACCO's manufacturing process into a large trench on a private farm located about seven miles south of Verona (*id.* at A4, A56-A57).

2. In October 1979, acting on an anonymous tip, EPA investigated the farm site, where EPA found

" 'alarmingly' high concentrations" of hazardous substances leaking from "badly deteriorated" drums (Pet. App. A4-A5, A58-A59). EPA found that the wastes threatened to contaminate the ground water source for several "nearby residential and agricultural wells" and that "there was a substantial likelihood of human and environmental exposure" (*id.* at A62, A80). EPA accordingly took certain temporary steps to minimize further migration of the hazardous substances into the environment (*id.* at A4-A5, A58-A60).

In August 1980, the United States brought this suit against petitioners and several others.[2] Following a bench trial, the district court held (Pet. App. A80-A87, A92) that petitioners were liable under Sections 104, 106(a), and 107(a) of CERCLA for all the government's previous cleanup costs at the farm site, except those incurred prior to CERCLA's enactment in December 1980, and for all future costs of cleanup at the site. The district court rejected (Pet. App. A70-A76) petitioners' contention that such an imposition of liability under CERCLA would violate due process and agreed (*id.* at A76-A78) with the government that Congress intended in CERCLA to impose a standard of strict liability. The court, however, rejected (*id.* at A63-A68) the government's view that petitioners were similarly

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[2] One of the codefendants was the Syntex Agribusiness, Inc., which was then the operator and lessor of the Verona plant; NEPACCO ceased to do business after 1972 (see Pet. App. A37). *Id.* at A5. Syntex entered into a settlement agreement and consent decree with EPA and, pursuant to that agreement and decree, undertook a temporary cleanup of the farm site by storing the waste in a concrete bunker (*ibid.*). The government has since incinerated nearly all of the materials from the site.

liable under Section 7003 of RCRA. According to the district court (Pet. App. A68), "Section 7003 does not impose liability upon past non-negligent off-site generators or transporters."

3. The court of appeals affirmed in part and reversed in part (Pet. App. A1-A44). The government prevailed in all respects. The court affirmed (*id.* at A9-A10, A30-A34) the district court's ruling that petitioners NEPACCO and Lee were liable under CERCLA for the government's past cleanup costs and would be liable for future cleanup as well. The court of appeals also agreed (*id.* at A11-A12) with the district court that such a "retroactive" imposition of liability under CERCLA did not violate due process. Unlike the district court, however, the court of appeals ruled (*id.* at A13-A19) that CERCLA authorizes the recovery of government cleanup costs incurred prior to CERCLA's enactment.

The court of appeals also reversed (Pet. App. A20-A28) the district court's dismissal of the government's count based on Section 7003 of RCRA. The court of appeals held (Pet. App. A28 (emphasis omitted)) that RCRA imposes liability upon past off-site generators and transporters of hazardous substances under a strict liability theory and that such an application of RCRA is not retroactive in a constitutional sense because it "imposes liability for the present and future conditions resulting from past acts." The court also ruled (Pet. App. A34-A36) that petitioners Michaels and Lee were liable in their individual capacities under RCRA.[3] Finally, the

[3] Judge Gibson dissented from the court's holding with respect to Section 7003 of RCRA, but otherwise concurred with the court's opinion (Pet. App. A44-A47).

court of appeals held (*id.* at A38-A42, A42-A43) that the district court had correctly placed on petitioners the burden of proving the extent to which the government's cleanup costs were not recoverable under CERCLA, and the court had not erred in denying petitioners' Seventh Amendment claim that they were entitled to a jury trial.

DISCUSSION

1. Petitioners argue (Pet. 12-14) that neither CERCLA's nor RCRA's liability provisions apply to conduct of petitioners that occurred prior to the statute's enactment (which for CERCLA was its effective date (see 42 U.S.C. 9652(a)). Under that view, the liability provisions of neither statute would apply to hazardous waste sites that were abandoned and rendered inactive prior to enactment of those laws. Petitioners also claim (Pet. 18-20) that Congress did not intend CERCLA or RCRA liability to be governed by a strict liability standard. These claims lack merit and, as petitioners implicitly concede, the decision of the court of appeals does not conflict with any decision of any other court of appeals—with respect to these or any of the other questions presented.[4] Accordingly, further review is not warranted.

a. Contrary to petitioners' contention (Pet. 13), CERCLA does "unequivocally [and] clearly mani-

[4] Indeed, this is virtually the first court of appeals' decision to address any of the issues raised by petitioners in this case. The only federal appellate court that has also addressed an issue raised here is the Fourth Circuit in *United States* v. *Waste Indus., Inc.*, 734 F.2d 159, 163-167 (1984), which, like the court of appeals in this case, held that RCRA applies to past conduct.

fest" congressional intent that it apply to past conduct that created hazardous waste disposal sites that were abandoned and rendered inactive prior to CERCLA's enactment. The language of the statute, its structure, and its legislative history leave no doubt that Congress intended CERCLA's liability provisions to apply to such sites and, hence, to require parties responsible for their creation ultimately to bear any costs expended for their cleanup.

The key liability provisions of Section 107 are, significantly,[5] written in the past tense. The statute imposes liability on those who "owned or operated" the disposal facility, "arranged" for transportation of the waste, and "accepted" the waste for transportation. See 42 U.S.C. 9607(a)(2) ("any person who at the time of disposal * * * owned or operated any facility at which such hazardous substances were disposed of"), 9607(a)(3) ("any person who * * * arranged with a transporter for transport for disposal"), 9607(a)(4) ("any person who * * * accepted any hazardous substances for transport to * * * sites selected by such person").[6] Such lan-

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[5] Petitioners contend (Pet. 12-13) that the past verb tenses reflect only the necessary circumstance that arrangements for disposal of hazardous waste must precede their release. Congress's use of the past tense, however, cannot be so narrowly explained. Had Congress, for instance, intended CERCLA to apply prospectively only (as petitioners claim), Congress plainly could have drafted CERCLA to embrace only a party who "arranges" for a disposal that results in a release.

[6] Other liability provisions in CERCLA—particularly those concerned with natural resource damages—show that Congress generally intended to reach past conduct and further show that when Congress intended to limit the retrospective reach of CERCLA liability, it did so expressly. Under Sec-

guage is strong evidence of congressional intent to reach past conduct. See *Barrett* v. *United States*, 423 U.S. 212, 216-217 (1976); see also *Costello* v. *INS*, 376 U.S. 120, 123 (1964) (discussing *United States ex rel. Eichenlaub* v. *Shaughnessy*, 338 U.S. 521, 527-530 (1950)).

In addition, as described by the court of appeals (Pet. App. A10-A11), "the statutory scheme itself is overwhelmingly remedial and retroactive" and must "to be effective, * * * reach past conduct." Congress "was well aware that the funding level of Superfund was and is insufficient to clean up more than a few of the most dangerous waste disposal sites" (*Exxon Corp.* v. *Hunt*, No. 84-978 (Mar. 10, 1986), slip op. 14). Under petitioners' view, however, EPA would have to rely exclusively on Superfund monies to clean up hazardous waste sites that were abandoned and rendered inactive prior to CERCLA's enactment; the government would not be able to seek reimbursement from responsible parties. CERCLA's goal to clean up abandoned and inactive sites would thereby be frustrated.

Finally, the title of the statute and repeated descriptions of its purpose in the legislative history provide further evidence that Congress intended CERCLA to impose liability for the cleanup of sites abandoned prior to its enactment. Congress titled

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tion 107(f), recovery for natural resource damage is barred "where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980" (42 U.S.C. 9607(f)). Hence, under Section 107(f), liability is imposed so long as the damage to natural resources and the release of hazardous substances into the environment continue past CERCLA's effective date. It is not a sufficient defense that the conduct of the liable party may have occurred prior to that date.

CERCLA "An Act [t]o provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of *inactive* hazardous waste disposal sites" (Pub. L. No. 96-510, 94 Stat. 2767 (emphasis added)). The legislative history likewise focuses on the pressing need to clean up inactive and abandoned hazardous waste sites. See, *e.g.*, H.R. Rep. 96-1016, 96th Cong., 2d Sess. Pt. 1, at 22 (1980) (CERCLA intended "to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites."); S. Rep. 96-848, 96th Cong., 2d Sess. 2 (1980) (Problem addressed by CERCLA is "[t]he legacy of past haphazard disposal of chemical wastes * * *.").[7]

b. Also without merit is petitioners' claim (Pet. 13-14) that Section 7003(a) of RCRA does not apply to a hazard created by a site abandoned and rendered inactive prior to enactment of that law. As the court of appeals recounts (Pet. App. A22-A27), and as petitioners concede (Pet. 13), Congress specifically addressed this issue in a 1984 clarifying amendment to Section 7003(a). As amended, Section 7003(a) refers to evidence of "*past or present* handling, stor-

[7] Nor is there substance in petitioners' reliance (Pet. 13) on congressional replacement of an explicit reference to "prior owners," contained in the original Senate bill, with the more general language of the bill as enacted. The language of the two versions differs, but the literal terms of both impose liability on persons, such as petitioners, responsible for the creation of hazardous waste sites that were abandoned prior to CERCLA's enactment. Petitioners, moreover, fail to point to any legislative history to support their claim that the substitution in language was intended to ensure that CERCLA did not apply retroactively.

age, treatment, transportation or disposal of any solid waste or hazardous waste [that] may present an imminent and substantial endangerment to health or the environment" (42 U.S.C. (Supp. III) 6973 (emphasis added)). The amended Section 7003 explicitly authorizes EPA to "bring suit * * * against any person (including any *past or present* generator, *past or present* transporter, or *past or present* owner or operator of a treatment, storage, or disposal facility) who *has contributed or who is contributing* to such handling, storage, treatment, transportation or disposal" (*ibid.*). Hence, petitioners' claim that Section 7003 does not apply to past conduct is untenable.

Petitioners argue (Pet. 14), however, that these amendments do not bear on this case—and were "unconstitutional"—because they were enacted after the district court ruled that RCRA did not apply and were specifically intended to overrule that ruling. Petitioners are wrong. Congress clearly possesses the authority, which it frequently exercises, to amend a federal statute in response to a judicial construction of the statute with which it disagrees. See, *e.g.*, *California Fed. Sav. & Loan Ass'n* v. *Guerra*, No. 85-494 (Jan. 13, 1987), slip op. 3-4; *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 278 (1974). Moreover, where, as in this case, the litigation is ongoing, a prior judicial interpretation does not limit the legislature's authority to amend the law, and the appellate courts in that litigation should generally apply the law as Congress has clarified or changed it. See *Bradley* v. *Richmond School Bd.*, 416 U.S. 696, 711-716 (1974). The court of appeals therefore properly applied Section 7003, as amended, to petitioners.[8]

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[8] Petitioners are entitled to application of the statute as it was written at the time this case was first brought only if

c. Finally, petitioners argue (Pet. 18-20) that liability under both CERCLA and RCRA should be governed by a negligence standard and not, as the court of appeals apparently assumed, a strict liability standard. Review on this issue, which petitioners did not even raise in the court of appeals and that court explicitly declined to consider (see Pet. App. A8 n.3), is not appropriate. In any event, Congress has made plain that strict liability is the appropriate standard under both CERCLA and RCRA and no court of appeals has held to the contrary.

When it amended Section 7003(a) of RCRA in 1984, Congress made clear its view that liability

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"appl[ication of] the law in effect at the time [of the court's] decision * * * would result in manifest injustice or there is statutory direction or legislative history to the contrary" (*Bradley* v. *Richmond School Bd.*, 416 U.S. at 711). Neither exception applies in this case. Indeed, as admitted by petitioners (Pet. 14) and as described by the court of appeals at some length (Pet. App. A24-A27), Congress specifically spoke in 1984 to the meaning of Section 7003(a) as originally enacted in 1976 and unequivocally expressed not only its disagreement with the construction adopted by the district court in this case, but also its intention to supersede that interpretation by means of the amendments. See Pet. App. A25 (quoting H.R. Conf. Rep. 98-1133, 98th Cong., 2d Sess. 119 (1984) (emphasis added)) (" 'The section was intended *and is intended* to abate conditions resulting from past activities. Hence, the district court decision[] in * * * *United States* v. [*NEPACCO*], 579 F. Supp. 823 (W.D. Mo. 1984) * * * [is] inconsistent with the authority conferred by the section as initially enacted and with these clarifying amendments.' "). Moreover, even if the meaning of Section 7003 prior to the 1984 amendments remained a relevant question in this case, the views of the Ninety-Eighth Congress would be entitled to consideration with respect to that question (see, *e.g.*, *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 596 (1980)). In any event, the issue of RCRA's meaning until 1984 would not present an issue of continuing importance that warranted this Court's review.

under that provision had been and should be "without regard to fault or negligence." H.R. Rep. 98-198, 98th Cong., 1st Sess. Pt. 1, at 48 (1983). The House Report accompanying the legislation further specified (*ibid.*) that "Section 7003 * * * has always reached those persons who have contributed * * * or are presently contributing to the endangerment, * * * regardless of fault or negligence." See also S. Rep. 96-172, 96th Cong., 1st Sess. 5 (1979) (liability under Section 7003 "similar to strict liability under common law"). See note 8, *supra*.

Congress also clearly intended to impose strict liability in CERCLA. Section 101(32) of CERCLA, 42 U.S.C. 9601(32), provides that the terms " 'liable' or 'liability' * * * shall be construed to be the standard of liability * * * under Section 1321 of title 33." As the district court observed (Pet. App. A77), it is well settled that Section 1321—which is the provision of the Clean Water Act concerned with liability for discharges of oil and hazardous substances—is governed by strict liability. The legislative history of CERCLA supports this view. See, *e.g.*, S. Rep. 96-848, 96th Cong., 2d Sess. 32 (1980) (the manufacture, transportation and disposal of hazardous substances are considered to be "abnormally dangerous activities for the purposes of this Act, and, therefore, subject to the rule of strict liability"); see also H.R. Rep. 99-253, 99th Cong., 1st Sess. Pt. 1, at 74 (1985) ("No change has been made in the standard of liability that applies under CERCLA. As under section 311 of the Federal Water Pollution Control Act, 33 U.S.C. 1321, liability under CERCLA is strict * * *.").[9]

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[9] Subsequent amendments to CERCLA confirm that Congress intended strict liability to apply. In 1986, Congress

2. Petitioners alternatively argue (Pet. 14-16) that the Fifth Amendment's Due Process Clause bars either CERCLA or RCRA from making petitioners "retroactive[ly]" liable for the cost of cleaning up a hazardous waste site that was abandoned and rendered inactive prior to enactment of those laws. The court of appeals correctly rejected this claim.

Even if one accepts petitioners' characterization of CERCLA and RCRA as "retroactive," [10] both laws satisfy due process concerns because each " 'adjust[s] the burdens and benefits of economic life' " and is "justified by a rational legislative purpose." See *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 729, 730 (1984) (quoting *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)). In particular, both CERCLA and RCRA seek to distribute the costs of cleaning up thousands of abandoned and inactive hazardous waste sites and each reflects Congress's reasoned determination that those who profited in the past from improper disposal of hazardous

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amended CERCLA to apply a negligence standard to certain types of cleanup activities that themselves create risks to the public health and the environment. See Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 107(c), 100 Stat. 1629. Congress indicated that it was making an exception from the strict liability standard otherwise applicable to responsible persons under the statute. See H.R. Conf. Rep. 99-962, 99th Cong., 2d Sess. 203-204 (1986).

[10] Both CERCLA and RCRA are concerned with present threats to public health and the environment and, in that sense, are prospective in focus even when applied to abandoned and inactive sites. See Pet. App. A28 (emphasis omitted) ("RCRA is not retroactive because it imposes liability for the present and future conditions resulting from past acts.").

wastes—rather than the general public—should bear the cleanup costs. See, *e.g.*, S. Rep. 96-848, *supra*, at 13 (Congress intended to make those "responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions."); H.R. Rep. 98-198, 98th Cong., 1st Sess. Pt. 1, at 48 ("The amendment reflects the long-standing view that generators and other persons involved in the handling, storage, treatment, transportation, or disposal of hazardous wastes must share in the responsibility for the abatement of the hazards arising from their activities."). In this respect, CERCLA and RCRA are basically similar to the federal statute upheld in *Usery* v. *Turner Elkhorn Mining Co.*, *supra*, which required operators of coal mines to compensate former employees disabled by black lung disease even if the employees had terminated employment prior to the statute's enactment.

Petitioners nonetheless contend (Pet. 15; see *id.* at 16) that RCRA and CERCLA are unconstitutionally retroactive because they "involve[] a new and wholly unexpected form of liability for anyone who was involved in the disposal of hazardous substances." As this Court explained in *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. at 16 (citations omitted), however, in rejecting a similar argument, "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. This is true even though the effect of the legislation is to impose a new duty or liability on past acts." In any event, CERCLA and RCRA do not impose on petitioners "a new and wholly unexpected form of liability." Strict liability is certainly not an "unexpected" standard to apply given the public health and environmental risks posed by hazardous waste. Dis-

posal of hazardous waste is an example of a classic "abnormally dangerous" activity for which strict liability has long been deemed appropriate. See Restatement (Second) of Torts § 520 (1977); S. Rep. 96-172, 96th Cong., 1st Sess. 5 (1979) (Section 7003 of RCRA is "essentially a codification of common law public nuisance remedies.").[11] Nor is the notion "new" that the government may seek either restitution of money spent to abate a hazardous condition from those responsible for its creation (see *Wyandotte Transp. Co.* v. *United States*, 389 U.S. 191 (1967)) or the imposition of joint and several liability in appropriate cases. With respect to the latter, sponsors of CERCLA specifically said it would apply only in circumstances where it would be appropriate under "traditional and evolving principles of common law." See 126 Cong. Rec. 30932 (1980) (remarks of Sen. Randolph); *id.* at 31965 (remarks of Rep. Florio); see also *id.* at 31978 (remarks of Rep. Jeffords).

Finally, contrary to petitioners' claim (Pet. 15-16), this Court did not hold in *Usery* v. *Turner Elkhorn Mining Co.* that the retroactive application of a federal statute violates due process whenever it has an incidental deterrent effect. The Court merely stated that it would "hesitate to approve" retroactive application of a statute satisfying due process concerns based on "any theory of deterrence" (see 428 U.S. at 17); the federal statute, in other words, must look elsewhere—as both CERCLA and RCRA do—to

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[11] For instance, Missouri courts have long applied strict liability in analogous circumstances. See, *e.g.*, *White* v. *Smith*, 440 S.W.2d 497, 503 (Mo. Ct. App. 1969) (nuisance); *Schnitzer* v. *Excelsior Powder Mfg. Co.*, 160 S.W 282, 284-285 (Mo. Ct. App. 1912) (explosives).

justify retroactive application. Indeed, were petitioners correct, the Court would likely have had to strike down the federal statutes challenged in *Usery* v. *Turner Elkhorn Mining Co.* and *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, which, like both CERCLA and RCRA, undoubtedly had some incidental deterrent effect. See, *e.g.*, *Pension Benefit Guaranty Corp* v. *R.A. Gray & Co.*, 467 U.S. at 723-724, quoting 126 Cong. Rec. 20234 (1980) (remarks of Sen. Matsunaga) ("retroactive effective date was designed * * * to serve 'as a deterrent * * *' ").[12]

3. Petitioners also err in arguing (Pet. 16-18) that the court of appeals erred in ruling that petitioners Michaels and Lee are liable in their individual capacities under CERCLA (Lee) and RCRA (Michaels and Lee).

The liability provisions of both CERCLA and RCRA leave no doubt that Congress intended to hold individuals personally liable for their acts. Section 107(a)(3) of CERCLA, 42 U.S.C. 9607(a)(3), imposes liability on "any person" who arranged for disposal or transport for disposal of hazardous wastes. "[P]erson" is defined in Section 101(21), 42 U.S.C. 9601(21), as "an individual, firm, [or] corporation * * *." Section 7003(a) of RCRA, as amended,

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[12] In their "Questions Presented," but not in their "Reasons For Granting the Petition," petitioners suggest (Pet. [i]) that CERCLA and RCRA violate Art. I, Sections 8 and 9. The former claim is never elaborated upon and we cannot even speculate as to its basis. The latter is plainly lacking in merit since neither CERCLA nor RCRA is directed to an "identifiable individual" (see *Nixon* v. *GSA*, 433 U.S. 425, 468 (1977)) and although RCRA contains criminal provisions, they are not at issue in this case (see *Mahler* v. *Eby*, 264 U.S. 32, 39 (1924)).

similarly provides for relief against "any person" who contributed to the disposal of hazardous wastes that present an endangerment, 42 U.S.C. 6973(a). RCRA, like CERCLA, defines "person" to mean an individual or a corporation, 42 U.S.C. 6903(15).

Accordingly, the language of neither statute supports petitioners' claim that individuals, such as petitioners Michaels and Lee, who arranged for transportation or disposal or contributed to an endangerment, are shielded from personal liability, if they can establish that they were acting as managers of the corporation. Indeed, Section 107(a) of CERCLA speaks directly to the availability of defenses and, by omission, rejects petitioners' suggestion. It explicitly provides that the only defenses available are those set forth in Section 107(b), which includes no such defense. See 42 U.S.C. 9607(a) and (b).

Finally, the facts of this case also support the court of appeals' determination (Pet. App. A31-A36) that petitioner Lee is personally liable under both CERCLA and RCRA and that petitioner Michaels is personally liable under RCRA. As the court of appeals observed (Pet. App. A32; see *id.* at A81-A85), "Lee, as plant supervisor, actually knew about, had immediate supervision over, and was directly responsible for arranging for the transportation and disposal of the NEPACCO plant's hazardous substances at the * * * site". Such conduct falls squarely within the ambit of both laws.

Michaels' involvement may have been less direct, but, as the court of appeals found (Pet. App. A36), it was sufficient to establish his liability under RCRA on the basis of his "contribut[ion]" to "the past or present handling, storage, treatment, transportation or disposal of any * * * hazardous waste [that]

may present an imminent and substantial endangerment to health or the environment." Michaels "knew" of the human health hazards associated with NEPACCO's waste and had participated in management decisions concerned with disposal of the waste (*id.* at A4, A55). He "was the individual in charge of and directly responsible for all of NEPACCO's operations * * *, and he had the ultimate authority to control the disposal of [its] hazardous substances" (*id.* at A36; see also *id.* at A85-A86). Indeed, Lee frequently reported to Michaels on operations (*id.* at A85). As described by the court of appeals (*id.* at A86), such personal and extensive knowledge and involvement in the operations of the plant, including the disposal of its hazardous waste, gave Michaels the "capacity to prevent and abate the damage caused by the disposal of hazardous wastes at the * * * site." [13]

4. Petitioners contend (Pet. 23-25) that the government may recover its cleanup costs under Section 107 of CERCLA only to the extent that its costs were incurred after CERCLA's enactment and only by affirmatively proving that its expenditures were not

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[13] Contrary to petitioners' contention (Pet. 17-18), holding them personally liable is not inconsistent with traditional common law principles. "The general, if not universal, rule is that an officer of a corporation who takes part in the commission of a tort by the corporation is personally liable therefor." 3A W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 1137 (rev. perm. ed. 1986). "The fact that an officer is acting for a corporation also may make the corporation vicariously * * * liable * * *; it does not however relieve the individual of his responsibility." See *Donsco, Inc.* v. *Casper Corp.*, 587 F.2d 602, 605-606 (3d Cir. 1978). There is no reason to suppose that a different principle should apply to strict liability torts.

inconsistent with the National Contingency Plan (NCP) and were reasonable.[14] Neither claim warrants further review.

a. First, the court of appeals correctly ruled (Pet. App. A13-A19) that Section 107 of CERCLA authorizes recovery of government response costs incurred prior to its enactment. Section 107(a)(4)(A), 42 U.S.C. 9607(a)(4)(A) (emphasis added), provides that the responsible party is liable for "*all* costs of removal or remedial action * * * not inconsistent with the [NCP]." Recovery is not limited to post-enactment costs. The only relevant factor under the statute is whether the costs incurred were "not inconsistent" with the NCP.

This omission of any time limitation was undoubtedly deliberate. Congress was well aware that substantial sums were already being expended (see, *e.g.*, S. Rep. 96-848, 96th Cong., 2d Sess. 11 (1980); *id.* at 122 (additional views of Sens. Domenici, Bentsen, and Baker)) and although Congress imposed a time limitation elsewhere in CERCLA—Congress limited recovery of natural resource damages (see note 6, *supra;* Pet. App. A18-A19)—it included no such limitation in Section 107(a)(4)(A). Hence, there is certainly no reason to conclude, as petitioners urge, that Congress intended (somewhat perversely) to bar the government from recovering its costs when, as in

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[14] Pursuant to Section 105 of CERCLA, 42 U.S.C. 9605, EPA revised in July 1982 the "National Contingency Plan (NCP)," which was originally a guide to federal cleanup of oil and certain hazardous substance spills. See 40 C.F.R. Pt. 300. Under Section 104(a)(1)(B) of the Act, 42 U.S.C. 9604(a)(1)(B), government response actions must be "consistent with" the NCP. See also 42 U.S.C. 9605 (responses "shall, to the greatest extent possible, be in accordance with" the NCP).

this case, the government began its response action early—prior to CERCLA's enactment—in order to provide immediate protection to the public health and safety.[15]

b. The court of appeals also correctly ruled that petitioners had the burden to prove the inconsistency of the government's expenditures with the NCP in order to establish that the government was not entitled to recover its full cleanup costs. Section 107(a)(4)(A) of CERCLA, 42 U.S.C. 9607(a)(4)(A) (emphasis added), provides that responsible parties are liable for "all costs of removal or remedial action incurred by the United States Government or a State *not inconsistent with* the [NCP]." The phrase "not inconsistent with the national contingency plan" creates an exception to the general rule established by Section 107(a) that the United States is entitled to recover "all costs." As the court of appeals held (Pet. App. A39 (citing *United States* v. *First City Nat'l Bank*, 386 U.S. 361, 366 (1967)), it is reasonable to assume that Congress intended that "[petitioners], as the parties claiming the benefit of the exception, [would] have the burden of proving that certain costs are inconsistent with the NCP and, therefore, not recoverable."[16]

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[15] In all events, whether the government may recover pre-enactment costs under CERCLA is not an issue that warrants this Court's review; the significance of that question is diminishing as the amount and proportion of post-CERCLA expenditures by the government is greatly increasing.

[16] Significantly, while Congress used the phrase "not inconsistent with" the NCP in that portion of the law concerned with recovery of government costs, Congress used the phrase "consistent with" the NCP in that portion of CERCLA concerned with recovery "by any other person" (see 42 U.S.C. 9607(a)(4)(B)). Congress may have intended that non-

For this reason, the court of appeals' ruling (Pet. App. A40) that costs not shown to be inconsistent with the NCP are "conclusively presumed to be reasonable" is also correct. The result is not, contrary to petitioners' claim (Pet. 24), tantamount to writing the government a " 'blank check.' " Rather, as the court of appeals explains (Pet. App. A41), the NCP itself incorporates those very considerations of cost-effectiveness and necessity that petitioners contend should have been considered by the district court. Cf. *Exxon Corp.* v. *Hunt*, slip op. 18. ("[T]he NCP provides the appropriate measure of whether a given expenditure constitutes 'costs of response or damages or claims which may be compensated' by Superfund.").[17]

5. Finally, petitioners' suggestion that the Seventh Amendment entitled them to a jury trial is without merit. As the Court recently explained in *Tull* v. *United States*, No. 85-1259 (Apr. 28, 1987)—a decision that is not cited by petitioners—the availability of a jury trial turns in large part on the character of "the relief sought" (slip op. 9): there

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governmental entities would, unlike the government, have the burden of establishing consistency with the NCP. The difference in wording presumably reflects the traditional notion that the actions of public officers are entitled to a presumption of regularity. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 415 (1971); *United States* v. *Chemical Found.*, 272 U.S. 1, 14-15 (1926).

[17] Petitioners complain (Pet. 23) that cost recovery under RCRA Section 7003 is not subject to a requirement of consistency with the NCP. The NCP may, however, be an appropriate measure to guide the courts' "equitable discretion" (Pet. 23) in RCRA actions. In any event, petitioners did not establish that unreasonable costs were incurred.

is no constitutional right to a jury when the requested relief is equitable rather than legal in nature.[18] That plainly is the case here.

As the court below recognized, "[w]hen the government seeks recovery of its response costs under CERCLA or its abatement costs under RCRA, it is in effect seeking equitable relief in the form of restitution or reimbursement of the costs it expended in order to respond to the health and environmental danger presented by hazardous substances" (Pet. App. A43).[19] The government's recovery in such a

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[18] The "nature of the action"—whether the cause of action was one that would have been brought in courts of equity rather than in courts of law prior to the adoption of the Seventh Amendment—also bears on the availability of a jury trial. See *Tull*, slip op. 4-5. Here, an action under CERCLA and RCRA plainly is equitable in nature, and petitioners do not contend otherwise. The closest historical analogue to the action in this case is the suit to abate a public nuisance (see *Tull*, slip op. 7, 11); indeed, Congress made it plain that Section 7003(a) of RCRA (42 U.S.C. 6973(a)) "is essentially a codification of common law public nuisance remedies." S. Rep. 96-172, 96th Cong., 1st Sess. 5 (1979). And there is little doubt that actions to abate public nuisances historically were brought in courts of equity. See *Mugler* v. *Kansas*, 123 U.S. 623, 672-673 (1887); *United Steelworkers of America* v. *United States*, 361 U.S. 39, 60 (1959) (Frankfurter & Harlan, JJ., concurring). Cf. *Tull*, slip op. 11.

[19] Petitioners' contention (Pet. 22) that the decision below conflicts with *Continental Ins. Co.* v. *N.E. Pharm. & Chem. Co.*, 811 F.2d 1180 (8th Cir. 1987), reh'g en banc granted, No. 85-1940 (Mar. 30, 1987), is without substance. The panel in that case held only that particular insurance policies, interpreted under Missouri law, covered CERCLA cleanup costs. That holding hardly establishes that judgments such as the one in this case are legal rather than equitable in nature for purposes of the Seventh Amendment. In any

case is measured by the costs it incurred in curing the environmental damage. Thus, in contrast to the situation in *Tull* (see slip op. 9-11), an action to recover costs under CERCLA and RCRA is not "intended to punish individuals"; it is designed, instead, "simply to extract compensation or restore the status quo" (*id.* at 9). And there is a "seeming unanimity of judicial thinking" that such nonpunitive restitutionary remedies are equitable in nature. *Setser* v. *Novack Inv. Co.*, 638 F.2d 1137, 1141, modified on other grounds, 657 F.2d 962 (8th Cir.), cert. denied, 454 U.S. 1064 (1981). See *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-418 (1975); *Curtis* v. *Loether*, 415 U.S. 189, 197 (1974); *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 402 (1946). Cf. *Tull*, slip op. 11.[20]

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event, the Eighth Circuit has granted rehearing en banc in the *Continental Ins.* case, thus obviating any possible tension between the decisions.

[20] Petitioners' contention that a restitutionary action is regarded as equitable only in cases of breach of duty by a fiduciary or of fraudulent deprivation of property (Pet. 20-21)—and not in cases where the defendant has been unjustly enriched or is obligated by statute to make restitution—cannot be reconciled with these decisions. See, *e.g.*, *Curtis*, 415 U.S. at 197 (Title VII backpay remedy generally regarded as equitable); *Porter*, 328 U.S. at 402 (action to require surrender of rents collected in excess of the statutory maximum is equitable). Indeed, had the government brought an action under either Section 106(a) of CERCLA (42 U.S.C. 9606(a)) or Section 7003(a) of RCRA (42 U.S.C. 6973(a)) to compel petitioners to abate the nuisance, the suit plainly would have been equitable in nature; the fact that the government addressed the imminent danger to public health by cleaning the site itself, and brought a subsequent action to establish petitioners' financial responsibility for the cleanup, does not alter the nature of the suit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.



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